

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 19, 2005

**WILNER DIEUDONNE v. METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY**

**Appeal from the Circuit Court for Davidson County
No. 02C-2796 Marietta Shipley, Judge**

No. M2005-00287-COA-R3-CV - Filed March 30, 2006

This action for personal injury arises out of a vehicular accident between the plaintiff and an on-duty police officer of the Metropolitan Government of Nashville and Davidson County. Plaintiff timely filed this action in the General Sessions Court; however, he failed to properly identify the defendant and service of process was returned unserved. Plaintiff did not attempt to renew service of process until after the one-year statute of limitations had run, waiting sixteen months before making his second attempt at service of process on the defendant. The trial court denied the defendant's motion to dismiss based upon its finding the plaintiff's delays in service of process did not constitute an abandonment of the claim. The case proceeded to trial, and the plaintiff was awarded damages. The defendant appeals contending the trial court erred by not dismissing the action. Finding the statute of limitations had run, we therefore reverse and remand with instructions to dismiss.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Reversed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

J. Brooks Fox and John Kennedy, Nashville, Tennessee, for the appellant, Metropolitan Government of Nashville and Davidson County, Tennessee.

Wilner Dieudonne, Nashville, Tennessee, ProSe.

OPINION

The plaintiff, Wilner Dieudonne, was involved in a vehicular accident on February 8, 2000 with Robert Conley, an officer of the Metropolitan Government of Nashville and Davidson County Police Department. Officer Conley was on duty when the accident occurred. The plaintiff made a

claim for personal injuries and property damage. The Metropolitan Government settled the plaintiff's claim for property damage, leaving only the issue of Plaintiff's personal injuries.

Plaintiff commenced this action by timely filing a civil warrant in General Sessions Court of Davidson County on February 6, 2001. Acting pro se, he listed the defendants on the civil warrant as "Metro Legal Department" and "Robert Conley." A deputy sheriff attempted to serve "Metro Legal Department" and Robert Conley with the civil warrant on February 14, 2001; however, both were returned unserved with the notation, "not to be found." Plaintiff took no further action to effect service of process for sixteen months.

On May 31, 2002 plaintiff filed an alias summons which was promptly issued by the Clerk of the General Sessions Court. A deputy sheriff attempted to serve the alias summons on "Metro Legal Department" and "Robert Conley." Officer Conley was served on June 17, 2002; however, "Metro Legal Department" was not served, and process was again returned with the notation, "not to be found."

In July of 2002, Plaintiff filed a motion to transfer the case from General Sessions Court to Circuit Court. The General Sessions judge granted the motion and the case was transferred to Circuit Court on September 12, 2002. Shortly thereafter, counsel, acting on behalf of the defendants, filed a motion to dismiss pursuant to Tenn. R. Civ. P. 12.02(5). The Metropolitan Government contended that neither of the defendants had been properly served, the statute of limitations had run, and that "Metro Legal Department" was not a legal entity capable of being sued. While the motion to dismiss was pending, Plaintiff filed an amended complaint in which the defendants were identified as the "Metropolitan Government" and "Robert Conley."

The motion to dismiss was heard in January of 2003, at which time the trial court ruled that the June 17, 2002 service upon Conley was proper and that the service of process on Conley constituted service upon the Metropolitan Government. The trial court additionally held that Conley was immune from suit because he was acting within the scope of his employment. As a consequence of this ruling, Conley was dismissed; however, the motion to dismiss the action as to the Metropolitan Government was denied. The case proceeded to trial on November 10, 2004, whereupon the plaintiff was awarded a judgment of \$3,382 for medical bills and pain and suffering.

The Metropolitan Government appeals, contending the case should have been dismissed as time barred due to Plaintiff's failure to timely re-issue summons.¹ This action started out in the General Sessions Court, thus Tenn. Code Ann. § 16-15-710 applies. The statute provides:

The suing out of a warrant is the commencement of a civil action, within the meaning of this title, whether it is served or not; but if the process is returned unserved, plaintiff, if plaintiff wishes to rely on the original commencement as a bar to the running of a statute of limitations, must either prosecute and continue the action by

¹ Defendant's appeal also contests an evidentiary matter regarding Plaintiff's expert at trial.

applying for and obtaining new process from time to time, each new process to be obtained within nine (9) months from return unserved of the previous one (1), or plaintiff must recommence the action within one (1) year after the return of the initial process not served.

When the deputy sheriff returned the summons on February 14, 2001 unserved, the plaintiff had nine months from the return of the unserved summons to reissue the summons, or Plaintiff could have recommenced the action within one year, the deadline for which would have been February 14, 2002. He did neither. As a consequence, the case against the Metropolitan Government was barred by the statute of limitations prior to transfer of the case to Circuit Court. Nevertheless, if it still had a pulse when the motion was heard in Circuit Court, the motion to dismiss should have been granted on the basis of Tenn. Code Ann. § 16-15-710 discussed above. Moreover, the case was not resuscitated when it was transferred to the Circuit Court because the Tennessee Rules of Civil Procedure provided no relief.

All civil actions are commenced by filing a complaint with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 90 days or is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint.

Tenn. R. Civ. P. 3.

Plaintiff waited sixteen months to seek the issuance of alias summons in the General Sessions Court. This delay prevented him from relying on the original commencement to toll the statute of limitations. Actions for personal injuries are subject to a one-year limitations period. *See* Tenn. Code Ann. § 28-3-104(a)(1).

For these reasons, the judgment of the trial court is reversed, and this matter is remanded with instructions to dismiss. Costs of appeal are assessed against Appellee, Wilner Dieudonne.

FRANK G. CLEMENT, JR., JUDGE